92-790

Supreme Court, U.S.
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No. 92-790

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

PAULINE SCHOCH,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Petitioner has filed this Petition for Writ of Certiorari under 28 U.S.C. § 1257(a), invoking the due process clause of the fourteenth amendment and claiming that her due process rights were violated by the allegedly retroactive broadening of the definition of nuisance which, even if not retroactively applied to her, is impermissibly vague and subjective.

This case was first heard by the local district justice, who found the Petitioner guilty of violating Penn Forest Township Ordinance 88-4 as to the storage of junk automobile parts (Petition for Writ of Certiorari at 2 (hereinafter "Petition")). On appeal before the Court of Common Pleas, the court again found the Petitioner guilty and affirmed her conviction (Petition, App.

1b). Thereafter, the Commonwealth Court also affirmed her conviction (Petition, App. 1a). The Petitioner, finally, filed a Petition for Allowance of Appeal with the Supreme Court of Pennsylvania, which that court denied (Petition at 2). The Petitioner has now filed the instant Petition for Writ of Certiorari.

SUMMARY OF THE ARGUMENT

The Petitioner, although attempting to frame her question using constitutional terms, has not raised a constitutional issue, but has merely raised again the issue of sufficiency of the evidence. That issue is in the province of and has been decided by the courts of Pennsylvania, with results uniformly against the Petitioner.

The Petitioner has not raised a conflict between Pennsylvania law and

federal law. Neither has the Petitioner shown a constitutionally incorrect application of Pennsylvania law. Rather, the result reached by the trial court, affirmed by the Commonwealth Court, and refused review by the Pennsylvania Supreme Court is amply supported by the evidence in the record and by prior case law. This case is, therefore, not in the character of cases that justify consideration by this Court because of special and important reasons.

ARGUMENT

I. THE QUESTION PRESENTED DOES NOT INVOLVE ANY SPECIAL OR IMPORTANT REASON FOR REVIEW SUCH AS WOULD BRING IT WITHIN THE CHARACTER OF REASONS THAT SUPPORT A GRANT OF CERTIORARI BY THE UNITED STATES SUPREME COURT.

Whether the question presented merits consideration by this Court is dependent upon whether there are "special

and important reasons" for granting certiorari. Sup. Ct. R. 10.1. The question presented in this case simply does not come within the kind of circumstances that the Court has described as justifying its consideration. For a conflict which would justify certiorari to exist, a Pennsylvania court of appeals would have to have made a decision about the application of criminal penalties for nuisance that "has not been, but should be, settled by this Court, or [that was] decided . . . in a way that conflicts with applicable decisions of this Court." Sup. Ct. R. 10.1(c). No such decision was made in this case, either directly or indirectly.

The Petitioner's invocation of the fourteenth amendment and the implication that Pennsylvania courts have not honored applicable due process standards might,

at first glance, appear to indicate a possible conflict with a holding of this Court on a federal question, which would be a possible basis for consideration by this Court under Sup. Ct. R. 10.1(c). Upon close view, however, it is clear that no such conflict exists.

The Petitioner has attempted to characterize this case as presenting a serious constitutional question on the issue of retroactive application of criminal sanctions. Petitioner presents her question as whether the application of a "broadened" nuisance standard can be upheld as consistent with constitutional due process requirements. The actual question that the Petitioner is raising, however, is merely a question of the sufficiency of the evidence. Pennsylvania appellate level courts have already re-

viewed that question and have declined to reverse the district judge's decision.

The Petitioner correctly states that the standard in nuisance matters requires a finding of actual nuisance (Petition at 5). She also correctly points out that the evidence did not affirmatively show loud noises, offensive odors, rodents presently infesting the area, or the presence of children in the immediate area (Petition at 8). She mistakenly concludes from these points, however, that a broadened law was retroactively applied to her and that her due process rights were violated (Petition at 6).

The Petitioner has mischaracterized the history of Pennsylvania law on nuisance. Both the Commonwealth Court, which affirmed the guilty verdict from the Court of Common Pleas, and the Pennsylvania Supreme Court, which denied the

request for appeal, were well aware of the State's long-standing standard of proof in nuisance cases, and neither held that any other standard should be applied. On the basis of (1) the Commonwealth Court's specific statement that nuisance in fact is required, (2) its knowledge that the standard of proof in criminal cases is proof beyond a reasonable doubt on every element of the offense and of what constitutes a nuisance under Pennsylvania law, and (3) its affirmance of the verdict of the Court of Common Pleas on the basis of the obvious correctness of the result, it is clear that the decisions of both the Commonwealth Court and the Pennsylvania Supreme Court followed due process requirements, rather than ruling in conflict with them.

The Petitioner's argument is apparently based on the mistaken assumption

that because the Commonwealth Court invoked Teal v. Haverford Township, 134 Pa. Commw. 157, 578 A.2d 80 (1990), allocatur denied, ___ Pa. ___, 593 A.2d 429 (1991), which post-dated the Petitioner's arrest, its determination and its affirmance were not supported by the correct standard for nuisance (Petition at 6). The Petitioner's assumption is erroneous, in the first place, because the Commonwealth Court relied on Teal only for the principle that township authority to prohibit nuisances was limited to proving nuisance in fact (See Petition, App. 3a), not for the standard of proof for showing nuisance in fact. Her assumption is erroneous, furthermore, because the only requirement for affirmance is that the result below be correct and supported by sufficient evidence. See, e.g., Dauphin County Technical School v. Dauphin Coun-

ty, 483 Pa. 604, 398 A.2d 168 (1978) (decision by a lower court may be affirmed if it represents a correct result, regardless of whether or not the reasoning behind the decision was correct); Appeal of Kit-Mar Builders, Inc., 439 Pa. 466, 268 A.2d 765 (1970) (same).

Even if the court did invoke a case which post-dated the offense in affirming the Petitioner's conviction, that would not raise a constitutional issue necessitating review by this Court unless the state courts also used, or approved, an incorrect standard. That was clearly not what happened in this case. First, as shown infra, Teal did not create a new and different standard. Second, even if it had done so, the affirmance of the Petitioner's conviction was consistent with and supportable under the prior law.

Regardless of the cases invoked, there was no error in the decision. On the facts of the case, there was no issue of reasonable doubt either at the trial or the appellate level. The evidence showed, beyond a reasonable doubt, that the Petitioner was in violation of the ordinance provisions, as charged.

II. THE DECISION IN THIS CASE AT THE STATE LEVEL WAS NOT IN CONFLICT WITH FEDERAL CONSTITUTIONAL DUE PROCESS REQUIREMENTS.

The Petitioner attempts to base her Petition on two due process arguments, both of which appear to be based on the premise that she had no warning that her actions were proscribed (See Petition at 5, 8). Her first argument is that a broadened definition of actual nuisance was retroactively applied by the Commonwealth Court, bringing her conduct within

the definition of nuisance in fact without notice to her that her conduct was proscribed. Her second argument is that the State's redefinition of nuisance fails to meet constitutional due process requirements because it is vague and subjective. As outlined infra, neither of these arguments has any merit and neither provides reason for review by this Court.

A. The State's Definition Of Nuisance Was Not Broadened In Teal, But Even If It Was, A Broadened Definition Was Neither Applied Improperly To Convict The Petitioner Nor To Affirm Her Conviction.

The Petitioner cites only two Pennsylvania cases in support of her argument that the nuisance standard applied to her case was a broadened standard which was retroactively applied to her: Commonwealth v. Hanzlik, 400 Pa. 134, 161 A.2d 340 (1960), and Teal v. Haverford

Township, supra. Obviously, there were many nuisance cases decided in Pennsylvania in the 30 years between those two decisions. A review of some of those intermediate cases makes it clear that, contrary to the Petitioner's argument, Teal did not broaden the standard, but merely restated a well-established standard.

As a preliminary matter, the Commonwealth Court in Teal left no room for doubt that the appropriate standard remains "nuisance in fact." Teal v. Haverford Township, supra, 578 A.2d at 82. The court in Teal, furthermore, did not invalidate the township's prohibition of the storage of disabled vehicles for more than 72 hours. Id. Rather, the court found that the township had failed to show that the vehicles on Teal's property constituted a nuisance since the

evidence did not establish, or even infer, that the vehicles posed any public danger, inconvenience, or distraction. Id. at 82-83.

In 1988, several years before this Petitioner's arrest and conviction, the Commonwealth Court stated that

> to constitute a public nuisance, the conduct must be an inconvenience or troublesome offense that annoys the whole community in general[.]

Feeley v. Borough of Ridley Park, 121 Pa. Commw. 564, 551 A.2d 373, 375 (1988) (emphasis added). In Feeley, the offense was the improper keeping of numerous cats that resulted in an odor which was an annoyance to the neighbors. In the present case, the offense was the improper keeping of junk that resulted in an eyesore which was an annoyance to the general public. It can scarcely be questioned that just as certain conditions can create an olfactory annoyance, so

other conditions can create a visual annoyance. While the annoyance in Feeley affected only the neighbors, the annoyance in the present case affected both the local area and the larger community of those that traveled on the adjacent main thoroughfare.

Admittedly, under Pennsylvania law, aesthetic considerations alone are insufficient to support a conclusion that the operation of a legitimate business is contrary to the best interests of the community. Rogalski v. Township of Upper Chichester, 406 Pa. 550, 178 A.2d 712, 714 (1962). A legitimate business, therefore, may not be prohibited per se. Commonwealth v. Christopher, 184 Pa. Super. 205, 132 A.2d 714, 717 (1957) (operation of junkyard as legitimate business, while offending aesthetic taste, is not a nuisance per se). It was these

very principles that led to the Hanzlik decision, upon which the Petitioner in this case wishes to rely.

In Hanzlik, the Supreme Court of Pennsylvania struck down the township ordinance which declared that the storage of abandoned or junked automobiles was, per se, a nuisance. Commonwealth v. Hanzlik, supra, 161 A.2d at 343. Hanzlik involved the conviction, under the ordinance, of the operator of a junkyard business. Id. at 341. The court noted that the business involved no loud noises or offensive odors, attracted no vermin, and was not injurious to the public. The court stated:

> "In our case there was no testimony adduced from which we may find that the operation of appellant's [appellees' here] business constituted a nuisance in fact nor was there any testimony to the effect that conditions in the township generally made the business of

> storing junked or abandoned automobiles a nuisance."

Id. (quoting the court below (emphasis added)).

Clearly, the court's reference to conditions in the township generally that could make the business of storing junk a nuisance contemplates a far broader standard for nuisance than the one stated by the Petitioner (See Petition at 5). The standard which the Petitioner would enshrine merely incorporates the list which preceded the above-quoted language --a list which merely noted that certain conditions, which in and of themselves would clearly constitute nuisance in fact, had not been shown, a list which was obviously not intended to be a statement of a definitive, exclusive standard on nuisance.

The definitive standard, in fact, had been stated much earlier by the Supreme Court of Pennsylvania:

> ["]In legal phraseology, the term 'nuisance' is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his own property, real or personal, or from his own improper, indecedent, or unlawful personal conduct, working an obstruction or injury to a right of another, or of the public, and producing such material annoyance, inconvenience, discomfort or hurt that the law will presume a consequent damage."

Kramer v. Pittsburgh Coal Co., 341 Pa. 379, 19 A.2d 362, 363 (1941) (quoting 46 C.J. at 646). Pittsburgh Coal, of course, also involved the conduct of a business. Importantly, while a municipality may not prohibit a legitimate business by denominating it a per se nuisance, a municipality may control the location of certain activities, business or otherwise. Furthermore, what may not

constitute a nuisance in one location may very well do so in another.

In the present case, the challenged ordinance did not prohibit junkyard businesses or declare them to be nuisances per se. Rather, under Penn Forest Township Ordinance 88-4 § 6A, it prohibited the storing of junk, except where specifically permitted by the zoning ordinance (Petition, App. 4c). The ordinance in the present case, therefore, does not fit within the Hanzlik prohibition from unauthorized declarations of what constitutes a nuisance per se. The violation in the present case, however, does fit within the other kinds of nuisance, not found to exist in Hanzlik, which result from nuisance in fact or from conditions in the Township that make storing junked or abandoned automobiles a nui-

sance. See Commonwealth v. Hanzlik, supra, 161 A.2d at 341.

The storing of junk in this case constituted a nuisance in fact because of the conditions on the property, in and of themselves, and because of the conditions in the Township.

The uncontroverted evidence showed rusted materials and broken glass in an unfenced area adjacent to residential dwellings--a clearly hazardous condition with the potential for injury (See Petition, App. 4a, 4b). It also showed abandoned vehicles in high grass--a clearly potential, if not actual, site for rodents, snakes, and mosquitoes, as well as a significant eyesore along the main artery in and out of the Township for tourists and residents alike (See Petition, App. 2b).

Contrary to the Petitioner's assertion, it is not necessary under Pennsylvania law to show actual infestation of a property or to show actual injury to a person in order to declare the conditions on a property to be a nuisance in fact. See Groff v. Commonwealth, 100 Pa. Commw. 135, 514 A.2d 300 (1986), allocatur denied, ___ Pa. ___, 529 A.2d 1083 (1987) (conviction for violating ordinance prohibiting nuisance on private property by storage of one sole, unlicensed, unregistered motor vehicle upheld on basis of potential hazard). A landowner properly may be found guilty of storing junk on private property in violation of an ordinance, even without a specific finding of public hazard. Scott v Commonwealth, 134 Pa. Commw. 519, 578 A.2d 1022 (1990) (the condition of vehicles without stickers, surrounded with high weeds,

with substantial amounts of litter and creatures was, additionally, a nuisance in fact). In the present case, the Court acknowledged that the conduct did not involve any business activity and specifically agreed that the evidence established beyond a reasonable doubt that dangerous and hazardous conditions existed on the Petitioner's property (See Petition, App. 4a, 4b). No more was required.

In Commonwealth v. Sadecky, 41 Pa. Commw. 86, 398 A.2d 1073, 1075 (1979), the court specifically stated that a haven for rodents is a nuisance in fact and that it is not necessary to prove actual injury in order to establish a nuisance in fact. Clearly, the junked automobiles abandoned in high grass on the Petitioner's property in this case provided a breeding ground for rats,

snakes, and similar creatures--whether or not such creatures had actually been observed. Similarly, the rusted auto parts and broken glass constituted a hazardous condition--whether or not any children had actually been seen on the property.

These principles apply even in cases involving legitimate business activities, which cannot be prohibited as nuisances per se, as noted supra. In another Pennsylvania case, the court found similar property conditions to those in the instant case: wrecked, junked, and abandoned vehicles, auto parts, and broken glass. Talley v. Borough of Trainer, 38 Pa. Commw. 441, 394 A.2d 645, 646 (1978). The court found that the actual condition of the property, notwithstanding the fact that it was the site of a legitimate automobile body repair business, was such as "to give rise to a conclusion that the

storage of wrecked, junked, and abandoned vehicles thereon constituted a public hazard and, thereby, a nuisance in fact." 394 A.2d at 646. In the current case, similarly, the conditions on the property constituted a public hazard and a nuisance per se.

B. The Teal Definition Of Nuisance Is Not Unconstitutionally Vague And Subjective.

In a similar challenge to that of the Petitioner, a property owner contested a sign prohibition, claiming that the ordinance was unconstitutionally vague. H.A. Steen Industries, Inc. v. Cavanaugh, 430 Pa. 10, 241 A.2d 771 (1968). The Pennsylvania Supreme Court found the argument to be without merit, as the ordinance plainly prohibited the plaintiff's signs. 241 A.2d at 777. In the present case, the Petitioner does not

even claim that the ordinance is vague, nor could she reasonably do so (See Petition, App. 2c-5c). As the Pennsylvania courts found, the prohibited conduct under the ordinance should be easy enough to understand (Petition, App. 5a, 3b). Instead, the Petitioner is now claiming that the standard for nuisance under Teal is unconstitutionally vague.

As discussed supra, while the Commonwealth Court may have cited the Teal case, the Teal standard is simply not a new or broadened standard. It is the same standard used in Hanzlik and in all the cases thereafter. The only law which is legitimately relevant to the Petitioner's vagueness argument, in any case, is the Township ordinance under which the Petitioner was convicted. That ordinance could scarcely have been more clear as to what conduct is prohibited. While the

Petitioner may not like the ordinance, she can hardly argue that she was without adequate notice as to what conduct was prohibited.

III. THE TEAL DEFINITION OF NUISANCE WAS NOT RETROACTIVELY APPLIED TO THE PETITIONER IN VIOLATION OF THE PETITIONER'S RIGHTS UNDER THE CONSTITUTION.

The Petitioner argued to the Pennsylvania courts that application of the ordinance to her constituted retroactive application of a criminal offense because placement of junk on her property predated the ordinance (Petition, App. 4b). The courts below determined that this was not a retroactive application of a new law to prior conduct, but rather a current application of the law to current conduct (Petition, App. 4b-5b, 6a). This conclusion is consistent with the result in Commonwealth v. Barnes & Tucker Co.,

455 Pa. 392, 319 A.2d 871 (1974) (concluding that application of nuisance law to condition which existed on date that law became effective was not an impermissible retroactive application even though condition resulted from events which occurred prior to that date). Having lost the retroactivity argument at every stage of the state proceedings, the Petitioner now attempts to argue that a broadened definition of nuisance was retroactively applied to her by the Commonwealth Court, in violation of the federal Constitution, in its affirmance of the decision of the Court of Common Pleas.

As discussed supra, the standard used by the Commonwealth Court was not a broadened standard at all, but merely a restatement of the long-established standard. Even if the Commonwealth Court had affirmed on the basis of a broadened

standard, however, there is no issue meriting review by this Court unless a constitutionally correct standard would have required reversal of the decision of the Court of Common Pleas. It is clear that the Court of Common Pleas applied a nuisance-in-fact standard (Petition, App. 3b). It is equally clear that its decision was based on the "obvious potential for injury" from the "dangerous and hazardous condition" on the Petitioner's property (Petition, App. 4b). It is, finally, clear that the decision of the Court of Common Pleas is supportable under cases, discussed supra, which predate both Teal and the Petitioner's conviction. The Petitioner's reason as to why this Court should grant the Writ of Certiorari is simply makeshift and without any legal or factual basis.

The Petitioner attempts to obtain review in this case by putting the cart in front of the horse. The cases cited by the petitioner in support of her retroactive application argument involved judicial interpretation of legislation, whereby the scope of prohibited conduct was either narrowed or broadened in order to save the applicable provision against a constitutional challenge (Petition 6-7). In the present case, by contrast, the scope of prohibited conduct under the ordinance was neither narrowed nor broadened by the decision in Teal or by any other decision.

Most of the cases by which the Petitioner attempts to support her retroactivity argument involve limitations on rights which are explicitly protected by the Constitution. See Osborn v. Ohio,

495 U.S. 103, rehearing denied, 496 U.S. 913 (1990) (first amendment right of freedom of expression); Colautti v. Franklin, 439 U.S. 379 (1979) (right to choose); Marks v. United States, 430 U.S. 188 (1977) (first amendment); Rabe v. Washington, 405 U.S. 313, rehearing denied, 406 U.S. 911 (1972) (same). By contrast, there is no constitutionally protected right to any given use of property. Rather, the only constitutional protections of property rights are that property may not be taken without just compensation and that individuals may not be deprived of property without due process of law. See United States Const. amends. V and XIV.

Under the guise of her constitutional arguments on retroactivity and vagueness, the Petitioner is really challenging the Township's exercise of its police

power through the ordinance which prohibits storage of junk, except as permitted by the zoning ordinance, and through the zoning ordinance, which does not permit the storage of junk on her property. As the Court of Common Pleas aptly noted,

> [s]urely, the police power of the Township enables it to prohibit any activity concerning the health, safety and welfare of the community.

(Petition, App. 4b.)

Although the Pennsylvania Supreme Court has not revisited the question of whether aesthetic considerations alone can justify police regulation, the regulation in this case was clearly concerned with more than aesthetics and was concerned with promoting the public safety. The challenged provisions of the ordinance were not unreasonable means for accomplishing that goal, nor were they unconstitutionally vague.

Upholding a similar ordinance, the Commonwealth Court of Pennsylvania acknowledged the potential health hazards from open storage of abandoned vehicles and the rational relationship between their prohibition and legitimate public ends. Groff v. Commonwealth, supra, 514 A.2d at 301 (upholding conviction for unauthorized storage of a single unlicensed and unregistered vehicle); cf. H.A. Steen Industries, Inc. v. Cavanaugh, supra (ordinance prohibiting signs within 150 feet of boulevard was neither vague nor unreasonable and was a legitimate exercise of police power). This is simply not a case like Bouie v. City of Columbia, 378 U.S. 347 (1964), in which the defendant had no reason to suspect at the time that his conduct was criminal. Under both the ordinance and the case law, the Petitioner in the present case had

crystal-clear warning of exactly what conduct was prohibited.

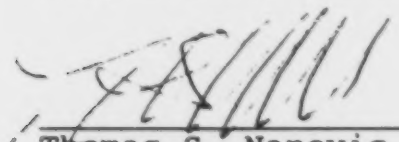
CONCLUSION

The Petitioner, rather than raising a serious constitutional issue, has merely attempted to raise again an issue of sufficiency of the evidence. This issue has already been passed upon by the courts of Pennsylvania with uniform results. If anything, this Petition merely represents an attempt to have yet another bite at the apple or, perhaps, to circuitously challenge the Township's police power, despite ample support in the evidence for the result reached by the trial court, affirmed by the Commonwealth Court, and refused review by the Pennsylvania Supreme Court.

The Petitioner certainly has not raised any conflict between Pennsylvania

law and any standards for nuisance required by the United States Constitution. This case is not in the character of cases that justify consideration by this Court because of special and important reasons. The Court should, therefore, deny this Petition for Writ of Certiorari.

Respectfully submitted,



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